Kamtech, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO. Cases 25–CA–25047–1 and 25–CA–25047–2

May 30, 2003

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER AND ACOSTA

On January 31, 2001, the Board issued its initial decision in this case, *Kamtech, Inc.*, 333 NLRB 242 (2001), which in part remanded the findings of Administrative Law Judge Karl H. Buschmann that the Respondent unlawfully refused to hire Mitch Dotson and Robert Young for further consideration in light of *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).[1] In his initial decision, the judge had found that the Respondent's supervisor, Wilton Sellers, unlawfully interrogated Dotson and Young about their union background when they applied for hire. Based on his credibility findings, the finding of an unlawful interrogation, and the applicants' extensive work experience, the judge also found that after learning they were union members, Sellers told both applicants they had failed their welding test; that he used the welding test as a pretext to refuse to hire Dotson and Young due to their union affiliation; and that both applicants would have passed the welding test and been hired had Sellers not applied the test in a pretextual manner. It was also clear from the judge's initial findings that the Respondent had job slots for both applicants. *Kamtech*, supra at 248.

On October 23, 2001, Administrative Law Judge Karl H. Buschmann issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's findings[2] and conclusions, and to adopt the recommended Order.[3]

In his supplemental decision, the judge specifically found that the Respondent, before becoming aware of Dotson's and Young's union membership, "had decided to hire them, provided that they passed the welding test."[4] The judge then found, based on specific credibility resolutions, that the Respondent pretextually applied the welding test to deny the applicants employment after learning about their union affiliation. He therefore reaffirmed his conclusion from the original decision that the Respondent violated Section 8(a)(3) by refusing to hire Dotson and Young.

The Respondent's exceptions are limited to the judge's credibility findings. It does not contest the finding of unlawful refusals to hire on any other basis. According to the Respondent, the Board should credit the testimony of Respondent's witness, Sellers, rather than the testimony of Dotson and Young, find that Sellers did not ask or know about the applicants' union affiliation, and find that he fairly applied the welding test in failing them.

As previously stated, the Board will not reverse a judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect.[5] We agree with the judge, based on the discriminatees' credited testimony that their respective performances in the welding test met the applicable standard of proficiency, that the welding text was applied in a pretextual manner. The judge also cited "the odds . . . against Young and Dotson, two highly experienced welders, both failing the same test at the same time and for the same reason." He also emphatically discredited Sellers, whom he found "unconvincing," "vague," "inconsistent," and "untrustworthy." His finding of pretext was accordingly justified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kamtech, Inc., Woodstock, New York, and Owensboro, Kentucky, its officers, agents, successors, and assigns shall take the action set forth in the Order, substituting the attached notice marked "Appendix."

[1] The unremanded portions of the Board's initial decision were enforced in *Kamtech, Inc. v. NLRB*, 314 F.3d 800 (6th Cir. 2002).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[4] In fact, as the Respondent has confirmed, Dotson and Young were both paid for the day, notwithstanding the Respondent's last-minute decision not to hire them.

[5] See fn. 2, supra. In addition, the Sixth Circuit rejected the Respondent's challenge to the judge's credibility resolution supporting the finding that Sellers unlawfully asked Dotson and Young about their union affiliation. 314 F.3d at 812. This finding is the law of the case and not subject to further review here.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to hire applicants for employment because of their union affiliations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Mitch Dotson and Robert Young employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges, if necessary terminating the service of employees hired in their stead.

WE WILL make Mitch Dotson and Robert Young whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire Mitch Dotson and Robert Young, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that our unlawful conduct will not be used against them in any way.

KAMTECH INC.

Michael T. Beck, Esq., for the General Counsel.
Cameron S. Pierce and *Eric Smith, Esqs.*, of Atlanta, Georgia, for the Respondent.
Michael T. Manley, Esq., of Kansas City, Missouri, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. On January 31, 2001, the Board issued its Decision and Order affirming with modifications, the findings, conclusions of law, and the recommended Order in this case,[1] and remanding the allegations concerning the refusal to hire Mitch Dotson and Robert Young to the judge for further consideration in light of *FES*, 331 NLRB 9 (2000). The Board accordingly ordered that the issue, whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Dotson and Young, be severed from the rest of the proceeding and be remanded for appropriate action, i.e., a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand.

I have reconsidered the relevant portions of the record in this case relating to the allegations in the complaint that the Respondent, Kamtech, Inc., "refused to hire or consider for hire applicants for employment Mitch Dotson and Robert Young," and I am satisfied that my decision adequately sets forth the factual background for an analysis of these issues. To briefly recapitulate, Mitch Dotson and Robert Young, members of the Boilermakers Union, Local 40, were unemployed in May 1996. They went to their union hall in search of work and were told that Kamtech was hiring. They went to the Company's Owensboro, Kentucky project and briefly spoke with John Webster, piping superintendent. Webster told them that he would call them if welding positions became available and made a note of their names. On or about June 4 or 5, 1996, Johnny Miller, Respondent's office manager in Owensboro, called Dotson about a welding job for them. Dotson and Young promptly reported at 7 a.m. on June 5, 1996, at the construction site. After completing the customary application process, they took a welding test administered by Wilmer Sellers, Respondent's quality control person. As reflected in my decision, Sellers told them that they had failed the test after asking them, "Are you all union?" (Tr. 431, 485).

The Respondent's commission of several unfair labor practices, as found in the underlying decision, clearly established the Company's antiunion animus. The decision also established that Sellers, acting as Respondent's agent, interrogated the applicants during the testing. Sellers' interrogation of the applicants in this regard violated Section 8(a)(1), as articulated in my decision and as affirmed by the Board. That the Respondent refused to hire the two applicants is not disputed. At issue, however, is whether Respondent's reasons relating to the welding test were pretextual or a legitimate business justification.

In *FES*, supra at 12, the Board restated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal to hire case as follows: "(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants."

The record clearly shows that Kamtech not only considered these applicants for employment, but that it had decided to hire

[1] 333 NLRB 242 (2001).

them, provided that they passed the welding test. Element (1) has accordingly been established based upon the showing that the Respondent had called them for employment. At the Respondent's behest, they had reported for work on the morning of June 5, 1996. They had completed the necessary steps in the application process, the written application, the drug test, and the safety film.

The final step was the welding test, which relates to element (2) and which I found in my decision to have been applied in a pretextual manner resulting in the applicants' dismissal from the employment opportunity. Neither, reopening the record for additional testimony, nor subjecting the applicants for retesting, can resolve the central issue, whether antiunion animus affected Sellers' judgment during his evaluation of the tests. That determination depends upon the observations by the individuals who were present at the time and place of the testing procedure. In this regard, the record contains the testimony of Sellers, denying the interrogation of the applicants about their union affiliation, as well as his version of the welding tests. Juxtaposed was the testimony of the two applicants who independently recalled the interrogation about the Union and their testing results. Confronted with conflicting testimony, I carefully considered the demeanor of the witnesses and the nature of the testimony, including its plausibility and its consistency.

More specifically, Sellers testified that he required the applicants to weld together or "tack" two steel pipes (coupons), 4 inches long and 2 inches in diameter, at a 45-degree angle. His instructions to the welders were as follows (Tr. 990):

> All I told the welders when they—before they started tacking it up is that I wanted it flush or better on the inside of the piece of pipe.

He testified that he examined a weld with a telescopic mirror and a flashlight, and that he examined Dotson's test in the same fashion. He concluded that it was "not acceptable," because "it had concave or slip back" (Tr. 996). Sellers similarly examined Young's test and also concluded that it was unacceptable for the same reason, "concavity." According to Sellers, neither applicant protested or expressed any disagreement with his conclusions, nor did they reapply to take the test in 30 days, even though they were told that they had that option.

Even assuming the accuracy of Sellers' testimony that as many as 50 percent of the applicants failed the test, the odds were against Young and Dotson, two highly experienced welders, both failing the test at the same time and for the same reasons. Moreover, Sellers' credibility, aside from his demeanor, was compromised when testifying about another employee who had taken a welding test. Richard Griffin had taken a welding test and passed. Sellers initially testified unequivocally that he administered a welding test to Griffin and that after he tested Griffin he "got hired in." However, when Sellers was confronted during cross-examination with documentary evidence to the contrary, he changed his story. The Company's official welding test form, dated May 28, 1996, was signed by Ricky Osteen on behalf of Kamtech and specifically showed that the welding test for Griffin was conducted by Osteen (CP Exh. 6). Sellers then testified that both he and Osteen had looked at that test, and that both of them had passed the individual. According to Sellers, this was the only test, among other tests conducted that day, which he and Osteen had passed jointly. Sellers emphatically denied questioning Dotson and Young about the Union or even mentioning the Union, but he admitted that he may have asked them about their prior welding jobs or about their welding experience on boilers.

Seller's demeanor as a witness was unconvincing. He displayed an eagerness to agree with the questions posed by Respondent's counsel. Except for his expertise in technical areas, his testimony appeared vague. His testimony about the testing of Griffin was contradictory and inconsistent. I find his testimony with respect to Young and Dotson equally incredible and untrustworthy.

Young and Dotson had clear and specific recollections of the events. I find their testimony consistent[2] and credible. For example, Young had carefully observed and examined Dotson's test. Young testified as follows (Tr. 431):

> Well, him and I both looked in it. With a mirror and flashlight you can check the weld on the inside. We both looked in it. I couldn't see a thing wrong with it. I seen a lot of welds.
>
> So Mr. Sellers come over there. He looks on it. He takes about 30 or 45 seconds. He takes a mirror and flashlight and the looks all in it, you know. Takes about 45 seconds I would say roughly.
>
> And he turned around to Mitch and I and he said—he turned around at this time and he said, "You all have been welding boilers?"
>
> And we said, "Yes, sir."
>
> He said, "Are you all union?"
>
> We said, "Yes, sir."
>
> So he just—at that time, he turns back around to the coupon, looks in it about three seconds and said, "You failed the test."

After Young completed his own test, he examined it for about 20 to 30 seconds with the mirror and a flashlight and concluded that it looked excellent. But Sellers' reactions, according to Young, were as follows (Tr. 432):

> So I went and I run—I put the welding path in my test and Mr. Sellers was there. He come over to it. He looked in it with his mirror glass for about five seconds and he said, "You failed the test."

Dotson similarly testified. He remembered that he completed his test in 12–15 minutes, and he recalled the following (Tr. 484):

> Well, I got a pen light and a little telescopic mirror and I always look the inside because that is where it counts. If the inside is not right, you have got time, you can go back and fix it.
>
> . . . .
>
> It was perfect.

Having completed his test, Dotson asked Sellers to inspect the test, and he described Sellers' reaction as follows (Tr. 485):

[2] All witnesses testified pursuant to an order of sequestration.

> He looked inside and he looked at it pretty close. I don't know—maybe close to a minute.
>
> . . . .
>
> He said, "Are you union?" No, he said, "Are y'all union?" And I said, "Yes, but now we are working away (phonetic)."
>
> . . . .
>
> He looked back at it maybe—maybe for about 20 seconds or even less and he started pointing out two or three places that was bad and he showed me. I never did see nothing he was pointing at.
>
> . . .
>
> He told me he couldn't accept it.

Dotson testified that Sellers' reaction with respect to Young's test was the same (Tr. 486):

> Well, I just kind of stood out of the way and Bob started running his test and he got it running and Mr. Sellers just went and he kind peeked at Bob's and told him he couldn't accept his either.

The Respondent has attacked the credibility of these witnesses on several grounds, first, that Young's testimony appeared inconsistent with Dotson's recollection that Sellers had advised them that they could reapply for the job after 30 days. As articulated in my decision, this minor variation in their testimony did not detract from their otherwise consistent recollection of the salient facts. Second, the applicants' tacit acceptance of the test results. Here, the Respondent ignored Sellers' testimony about his reaction to a failed test, i.e., that he never argued with the person who "busted" him. Third, that the applications did not reveal their union background. The applicants' intentionally hid their union affiliation, because they were concerned about a negative reaction from a nonunion employer.

The scenario clearly shows that Sellers' judgment was influenced by the applicants' admissions that they were union. The record shows that these applicants were highly skilled. Young testified that he possessed numerous welding certifications in virtually every type of welding, tig, stick, and heliarc, and that he had "taken well over 100 tests, welding tests, nuclear tests, nuclear reactors, boilers since 73" and that he failed only one (Tr. 433). Dotson similarly testified that he had been welding since 1978 and had plenty of experience in heliarc and tube welding. When asked if he thought that he failed Sellers' test, he answered clearly, "No way do I believe I failed it (Tr. 505).

In sum, I find that the General Counsel has also established element (2) in *FES*, supra, that the requirements for the positions were applied in a pretextual manner. These highly experienced welders would clearly have passed, had the test been considered in an objective manner. Any doubts in this regard should in any case be resolved against the interests of the wrongdoer or the Respondent who committed other violations of the Act. I further find that the General Counsel has established element (3), that antiunion animus contributed to the decision to fail the applicants and not to hire them. Obviously, the Respondent failed to establish that it would have rejected these applicants even in the absence of any union considerations. The factual scenario here is analogous to the Board's decision in *Fred'k Wallace & Son*, 331 NLRB 914 (2000), finding a violation, where the Respondent offered a position to an applicant and retracted the offer on learning about his union activity.

I accordingly conclude that the Respondent violated Section 8(a)(1) and (3) by refusing to hire the job applicants, Mitch Dotson and Robert Young, because of their union affiliations.

CONCLUSIONS OF LAW

1. The Respondent Kamtech, Inc. is an employee engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire Mitch Dotson and Robert Young because of their union affiliation.
3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1) and (3) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having refused to hire or consider for hire Mitch Dotson and Robert Young, the Respondent must offer them jobs which they were denied or, if these jobs no longer exist to substantially equivalent positions at new jobsites, if necessary and make them whole for any loss of earnings and other benefits as a result of the discrimination in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Kamtech, Inc., Woodstock, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants for employment because of their union affiliations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mitch Dotson and Robert Young employment in positions for which they applied for, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges; if necessary terminating the service of employees hired in their stead.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Mitch Dotson and Robert Young whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, plus interest.

(c) Within 14 days from the date of this Order, remove from its files the following: any reference to the unlawful refusal to hire Mitch Dotson and Robert Young and, within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful conduct of the Respondent will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payments records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Woodstock, New York, and Owensboro, Kentucky, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."